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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 533

JAMES W. DUTTON, ET AL.,
Appellants,

v.

J. MILLARD TAWES, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF MARYLAND,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

To The Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Appellants respectfully submit the following jurisdictional statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented.

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland (Appendix A, infra, page 15) is reported at 225 Md. 484 and

171 A. 2d 688. The opinion of the Circuit Court of Baltimore City was not reported, but is set forth on pages 20 to 61 of the Record Extract before the Court of Appeals of Maryland, nine copies of which have been filed herein.

JURISDICTION

This is an appeal from the final judgment of the Court of Appeals of Maryland affirming the Decree of the Circuit Court of Baltimore City which had declared that Chapter 269 of the Laws of Maryland of 1959 (ratifying a compact between the State of Maryland and the State of Virginia pertaining to the Potomac River) is constitutional. The final judgment and the Decree are set forth in Appendix B, infra, page 35). The original bill of complaint sought a declaratory decree pursuant to the provisions of the Uniform Declaratory Judgments Act, Article 31A of the Annotated Code of Maryland (1957 Edition). An injunction was also prayed in pursuance of the Maryland statute on injunctions, Article 16, Section 89 et seq. of the Annotated Code of Maryland (1957 Edition).

The final judgment of the Court of Appeals of Maryland was dated June 12, 1961 and was entered in the Circuit Court of Baltimore City on July 13, 1961. The notice of appeal was filed on September 8, 1961 in the Circuit Court of Baltimore City.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. Section 1257 (2). Such right of appeal from a final judgment or decree rendered by the highest court of a state where the validity of a statute of the state is unsuccessfully questioned on the ground of its being repugnant to the Constitution of the United States was sustained by this Court in *Metlakatla Indian Community v. Egan* (1960), 363 U.S.

555, 80 S. Ct. 1321, 4 L. Ed. 2d 1397; *McGowan v. State of Maryland*, decided May 29, 1961, 81 S. Ct. 1101, 6 L. Ed. 2d 393; *Lathrop v. Donohue*, decided June 19, 1961, 81 S. Ct. 1826, 6 L. Ed. 2d 1191; *Marcus v. Search Warrants*, decided June 19, 1961, 81 S. Ct. 1708, 6 L. Ed. 2d 1127; and *Torcaso v. Watkins*, decided June 19, 1961, 81 S. Ct. 1680.

The statutory provisions that are involved are lengthy and are cited as Chapter 269 of the Laws of Maryland of 1959. Nine copies of said statute have been filed herein. The pertinent text is set forth in Appendix C, infra, page 36.

QUESTIONS PRESENTED

1. Were Maryland's Watermen and other Citizens deprived of due process under the Fourteenth Amendment of the United States Constitution by the failure of Governor Tawes to publish the text of Chapter 269 of the Laws of Maryland of 1959 as required by the Constitution and Laws of Maryland?

2. Does Chapter 269 of the Laws of Maryland of 1959 violate the Federal Constitution because it authorizes a Joint Commission of Virginians and Marylanders to regulate and police the conduct of Marylanders on the Maryland-owned Potomac River?

3. Is said Chapter 269 in violation of the due process clause of the United States Constitution because it empowers Virginia Courts to try Marylanders for the commission of crimes on the Maryland-owned Potomac River?

4. Is said Chapter 269 Unconstitutional because the transfer of jurisdiction to Virginia Courts and other important provisions are not mentioned in the title of the Act?

5. Is said Chapter 269 unconstitutional because it abdicates the Maryland Legislature's power to legislate on the Maryland-owned Potomac River by removing the Legislature's power to pass laws relating to finfish, crabs, oysters and clams in the Potomac River after December 1, 1958?

6. Is said Chapter 269 unconstitutional because it delegates to the Joint Commission the Legislative power to reduce the maximum punishment for criminal offenses on the Maryland-owned Potomac River?

7. Is Chapter 269 unconstitutional because it usurps the power of Future Legislatures by illegally binding them to make annual appropriations of not less than $50,000.00 for the Joint Commission?

STATEMENT

Appellants are residents, citizens and taxpayers of Charles County and St. Mary's County, Maryland, who reside and work as watermen adjacent to and upon the Potomac River, making their living in the business of fishing, crabbing and oystering. The 1959 session of the Maryland Assembly enacted Chapter 269 to approve, confirm and ratify a compact between the State of Maryland and the Commonwealth of Virginia pertaining to the Potomac River. This law was forced to a state-wide referendum by petitions signed by almost 13,000 qualified voters in accordance with the provisions of Article XVI of the Constitution of Maryland. The Act was placed on the ballot in the election held on November 8, 1960. Although the Maryland constitutional and statutory provisions required that the text of the law be published at least in all the daily newspapers published in Baltimore City and in

two or more newspapers in each county, the text was published in only one Baltimore City newspaper, The Baltimore Sun. The text of the law was not published in The Baltimore News-Post, The Evening Sun or the Daily Record, which are three other daily newspapers in Baltimore City, nor was it published in any of the numerous newspapers within the 23 counties of Maryland, although 15 constitutional amendments on the ballot were published in 3 Baltimore City newspapers and 53 county newspapers. The Secretary of State explained that the failure to publish the text of Chapter 269 in any other Baltimore City newspapers or in any county newspapers was due to an "unintentional mistake" and a "misinterpretation of the statute" on the part of his office and that funds would have been readily available for the necessary publication if the mistake had not occurred. Although there was considerable publicity from which the public was enabled to learn that this referendum would be on the ballot, very little, if any, of the publicity referred to the terms of the Potomac River Compact, which terms were set forth in Chapter 269. Thus, very few Marylanders were familiar with the terms of the compact, including the provisions which would transfer part of the sovereignty over the Maryland-owned Potomac River to Virginia and which would empower Virginia officers to arrest Marylanders on the river and empower Virginia courts to try Marylanders for alleged offenses committed on the Maryland-owned river and to confiscate their vessels, boats and equipment.

Nor did the voters know that the Compact abdicated the Maryland Legislature's power to amend Maryland's laws relating to finfish, crabs, oysters and clams in the Maryland-owned Potomac River. In addition to the voters not

having the text of the Compact published in their newspapers, the electorate was also given misleading information regarding its terms by the Governor of Maryland, who issued a public statement which declared that "we give away nothing under the proposed agreement", and by the Chairman of the Maryland Tidewater Fisheries Commission, who mailed out 6,000 official letters, which were publicized in the newspapers, misrepresenting that "the only matter covered in the Compact is fishing rights" and that "Maryland in the Compact gives up nothing".

Appellants filed a bill for an injunction to enjoin the Governor of Maryland from issuing a proclamation declaring Chapter 269 of the Acts of 1959 to have been adopted by the people of Maryland as a part of the laws of the State of Maryland in the referendum vote held on November 8, 1960. The bill also requested a declaratory decree to establish that the text of Chapter 269 was not published in accordance with the requirements of Section 5 of Article XVI of the Constitution of Maryland before the election, thereby depriving the voters of an opportunity to read the text of the law in their newspapers as was intended by the constitutional provision and that the vote on the ratification of the law at said election was null and void. The bill also requested a declaratory decree to declare that said Chapter 269 was unconstitutional for the following additional reasons:

1. Because it authorizes a Joint Commission of Virginians and Marylanders to regulate and police the conduct of Marylanders on the Maryland-owned Potomac River.

2. Because it empowers Virginia Courts to try Marylanders for the commission of crimes on the Maryland-owned Potomac River.

3. Because the transfer of judrisdiction to Virginia Courts and other important provisions are not mentioned in the title of the Act.

4. Because it abdicates the Maryland Legislature's power to legislate on the Maryand-owned Potomac River by removing the Legislature's power to pass laws relating to finfish, crabs, oysters and clams in the Potomac River after December 1, 1958.

5. Because it delegates to the Joint Commission the Legislative power to reduce the maximum punishment for criminal offenses on the Maryland-owned Potomac River.

6. Because it usurps the power of future legislatures by illegally binding them to make annual appropriations of not less than $50,000.00 for the Joint Commission.

The Appellee filed a demurrer and answer and both sides filed motions for summary judgment. The Circuit Court of Baltimore City decreed that Chapter 269 was duly ratified by the voters and that the law was constitutional and dismissed the bill. Appellants appealed to the Court of Appeals of Maryland, which affirmed the decree of the lower court.

The parts of the bill of Complaint which alleged the constitutional violations aforementioned are set forth on pages 4, 5, 6 and 7 of the Record Extract filed herein. The prayers in the bill of complaint which requested that the law be declared unconstitutional are on pages 7 and 8 of the Record Extract. The Decree of the Circuit Court of Baltimore City declaring and decreeing "That Chapter 269 of the Acts of 1959 is constitutional" is included in Appendix B, infra, page 35.

FEDERAL QUESTIONS ARE SUBSTANTIAL

I. The Insufficient Advertising of the Referendum Deprived Plaintiffs of Due Process and the Equal Protection of the Laws under the Fourteenth Amendment of the United States Constitution.

This case involves a deprivation of the rights of the voters to be informed of the subject matter of the referendum upon which they had the right to vote, as well as the right of those specially interested in the referendum to have it voted upon intelligently by giving the voters notice of the text in accordance with the requirements of the Maryland Constitution. The voters and the parties whose livelihoods depend on the law were not only deprived of due process but they were also deprived of the equal protection of the laws. The text of 15 other questions to be voted upon in the same election were published in 3 Baltimore City newspapers and 53 county newspapers but this referendum was published in only one Baltimore City newspaper and in no county newspapers. This, despite the Maryland requirement that the text of the law be published at least in all the daily newspapers published in Baltimore City and in two or more newspapers in each of Maryland's 23 counties.

Section 170 of Article 33 of the Annotated Code of Maryland (1957 Edition) provides:

> "Not later than thirty days prior to any election at which laws are to be submitted to the voters under the provisions of Article XVI of the State Constitution, the text of any such measures shall be published by order of the Governor at least by one insertion in two or more newspapers within the several counties of the State and in all the daily newspapers published in Baltimore City which will publish the same at the current rate of commercial advertising; in the case of

> laws referred only to the voters of Baltimore City or of a particular county, such publication shall be made in at least one newspaper of general circulation in said city or county."

This statutory provision was enacted by the General Assembly in compliance with the mandate of Section 5(a) of Article XVI of the Constitution of Maryland, which reads as follows:

> "The General Assembly shall provide for furnishing the voters of the State the text of all measures to be voted upon by the people; provided, that until otherwise provided by law the same shall be published in the manner prescribed by Article XIV of the Constitution for the publication of proposed Constitutional Amendments."

This Court on October 9, 1961 heard the case of *Baker v. Carr*, No. 103 October Term 1960, No. 6 October Term 1961, on appeal from the decision reported in 179 F. Supp. 824 (M.D. Tenn. 1959) which is concerned with geographical discrimination against some of the voters because of unfair apportionment of election districts. The complaint was therein made that the right to vote was diluted by the geographical discrimination. In this case, the right to vote was diluted by the withholding of information from the voters in violation of the state constitutional requirement that the information be furnished. Voting in the dark is as much a dilution of the right to vote as that which is caused by unfair apportionment. Also, voters in the counties where the text of the referendum was not published in this case were denied equal protection of the laws just as voters in some counties were denied equal protection because of discriminatory apportionment in *Baker v. Carr*. In other words, this case involves geographical discrimination which dilutes the value of the

vote just as was involved in the case of *Baker v. Carr*. In this case, there is the added factor that 15 other questions voted upon in the same election were published in 56 newspapers, in accordance with the state constitutional requirement, whereas the question involved here was only published in one newspaper, in violation of the state constitution. People whose livelihoods may have depended on the 15 constitutional referenda were given their full right of having the voters properly informed, while the Appellants, whose livelihoods depend on the referendum involved here, were denied this right.

Similarly, this Court granted certiorari on March 22, 1960 in the case of *Gomillion v. Lightfoot*, 362 U.S. 916, which involved a state's legislative attempt to alter a city's boundaries for the purpose of diluting the voting rights of a group of Negroes. This Court considered this question sufficiently substantial to require that it be heard on its merits, and then on November 14, 1960 reversed the decision below by ruling that the allegations made out a cause of action, 364 U.S. 339, 81 S. Ct. 125, 5 L. Ed. 2d 110. Appellants submit that the dilution of the right to vote by removing the opportunity to vote intelligently is as substantial a deprivation of voting rights as that which may be caused by gerrymandering. Withholding of state constitutional rights which weaken the vote is offensive, whether it withholds knowledge of the matter being voted upon, whether it gives the voters unequal representation or whether it deprives the voters of full participation.

II. Various Provisions of the Statute Ratifying the Potomac River Compact Are Repugnant to the United States Constitution.

Several provisions of Chapter 269 of the Laws of Maryland of 1959 are unconstitutional because they violate the

due process clause and the equal protection clause of the Fourteenth Amendment.

Maryland's claim to the Potomac River as part of her territory was confirmed by this Court in *State of Maryland v. State of West Virginia*, 217 U.S. 577 and in *State of Maryland v. State of West Virginia*, 225 U.S. 1. Article 4 of the Declaration of Rights of Maryland declares, "That the People of this State have the sole and exclusive right of regulating the internal government and police thereof, as a free, sovereign and independent State." The attempt to transfer this right to a joint commission of Virginians and Marylanders would violate Appellants' right of due process.

In addition, Section 3 of Article V of the Compact transfers to Virginia Courts the jurisdiction to try persons for any offenses committed on the Potomac River. A Marylander may be tried in a Virginia Court for the alleged Commission of a crime on the Maryland-owned Potomac River. The section reads as follows:

> "Section 3. Jurisdiction of Court. The officer making an arrest or preferring a charge for violation of a regulation of the Commission or an applicable state law respecting the waters within the Commission's jurisdiction shall take the alleged offender to a court of competent jurisdiction in either State, in a county adjacent to the portion of the Potomac River where the alleged offense occurred, which shall thereupon have jurisdiction over the offense."

In *Huntingdon v. Attrill*, 146 U.S. 657, this Court agreed with the doctrine that one sovereign State's laws are not enforceable by another State, quoting the opinion of Chief Justice Marshall in *The Antelope*, 10 Wheat. 66, 146 U.S. 657, "The Courts of no country execute the penal laws of another."

This Court also reversed a conviction in *Burton v. United States*, 196 U.S. 283, because the offense charged was not committed in the State of Missouri, where the accused was tried.

Appellants were further deprived of their right of due process because the transfer of jurisdiction to Virginia Courts and other important provisions were not mentioned in the title of the Act, as required by Section 29 of Article 3 of the Maryland Constitution. Thus, the title failed to put the members of the General Assembly and the members of the public on notice, thereby further adding to the voting in the dark.

Another constitutional violation was the freezing of Maryland's laws relating to finfish, crabs, oysters and clams in the Potomac River after December 1, 1958. This Court stated in *Stone v. Mississippi*, 101 U.S. 116:

> "Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the State; but no Legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police. * * * The power of governing is a trust committed by the people to the government, no part of which can be granted away. The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights. These several agencies can govern according to their discretion, if within the scope of their general authority, while in power; but they can not give away or sell the discretion of those that are to come after them, in respect to matters the government of which, from the very nature of things, must vary with varying circumstances.

Chapter 269 is also unconstitutional because it delegates to the joint commission the legislative power to reduce

the maximum punishment for criminal offenses on the Maryland-owned Potomac River. In *United States v. Grimaud*, 220 U.S. 506, 521, this Court declared:

> "That Congress cannot delegate legislative power is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."

Similarly, Chapter 269 unconstitutionally usurps the power of future legislatures by illegally binding them to make annual appropriations of not less than $50,000.00 for the joint commission.

Thus, in addition to the subversion of constitutional rights caused by the woefully inadequate publication of the text of the statute, the law itself is violative of many constitutional safeguards. Such disregard for constitutional rights by both the governor and the legislature of the State require correction by this Court, which recently said in *Cooper v. Aaron*, 358 U.S. 1, 16-17:

> "The controlling legal principles are plain. The command of the Fourteenth Amendment is that no 'State' shall deny to any person within its jurisdiction the equal protection of the laws. 'A state acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government * * * denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning.' Ex parte Virigina, 100 U.S. 339, 347, 25 L. Ed. 676. Thus the prohibitions of the Fourteenth Amendment ex-

tend to all action of the State denying equal protection of the laws; whatever the agency of the State taking the action, see Virginia v. Rives, 100 U.S. 313, 25 L. Ed. 667; Com. of Pennsylvania v. Board of Directors of City Trusts of Philadelphia, 353 U.S. 230, 77 S. Ct. 806, 1 L. Ed. 2d 792; Shelley v. Kraemer, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161."

CONCLUSION

It is submitted that the Court has jurisdiction and the substantial, important federal questions involved justify the hearing of this appeal from a decree which erroneously declares constitutional a law that is clearly unconstitutional and which withholds from the Appellants protections which are guaranteed to them by the Fourteenth Amendment of the Constitution of the United States; namely, due process of law and equal protection of the laws.

Respectfully submitted,

HYMAN A. PRESSMAN,

Counsel for Appellants.

APPENDIX A

Opinion of Court of Appeals of Maryland

James W. Dutton et al.

v.

J. Millard Tawes, in his Official Capacity as Governor of the State of Maryland.

No. 1, Sept. Term 1961.

Court of Appeals of Maryland.

June 12, 1961.

Before BRUNE, C.J., and HENDERSON, HAMMOND, PRESCOTT and MARBURY, JJ.

Reargued before BRUNE, C. J., HENDERSON, HAMMOND, PRESCOTT, HORNEY, and MARBURY, JJ., and JAMES MACGILL, J., specially assigned.

HAMMOND, Judge.

Appellants are Southern Maryland citizens and taxpayers who earn their livelihood there by fishing, crabbing and oystering in the Potomac River. On their own behalf and on behalf of all others similarly situated who might desire to make themselves parties, they filed a bill in the Circuit Court of Baltimore City to enjoin the Governor from proclaiming Chapter 269 of the Acts of 1959, a compact with the State of Virginia relating to the Potomac River, to have been adopted by the people of Maryland as a law of the State in a referendum vote which had been taken at the election of November 8, 1960. The bill also prayed declarations (1) that the text of Ch. 269 had not been published prior to the election as required by Sec. 5 of Art. XVI of the Maryland Constitution and Code (1957),

Art. 33, Sec. 170, and therefore the vote on the proposed law was void, and (2) that the Act is unconstitution because (a) it authorizies a joint commission of Marylanders and Virginians to regulate and police the conduct of Marylanders on the Maryland owned Potomac River; (b) it empowers Virginia courts to try Maryland citizens for the commission of crimes on the Potomac River; (c) it delegates to the Joint Commission the legislative power to reduce punishment for criminal offenses on the Potomac River; (d) it usurps the power of future legislatures by binding them to make annual appropriations of not less than $50,000 for the Joint Commission; (e) it abdicates the Legislature's power to pass laws relating to fish, crabs, oysters and clams in the Potomac River after December 1, 1958; and (f) the title is deficient.

Judge Sodaro held the Act to have been duly approved by the voters and to be constitutional.

The origin and history of the compact of 1785 between Maryland and Virginia as to the Potomac River — which provided, inter alia, that "the right of fishing in the river shall be common to, and equally enjoyed by, the citizens of both states * * *" — and the definitive fixing of the low water mark on the south shore of the river as the boundary between Maryland and Virginia by the so-called Black-Jenkins Award of 1878 (with the approval of Congress, in 1879), all are set out in the opinion in Barnes v. State, 186 Md. 287, 295, 47 A. 2d 50. The two states long have had difficulties over the matters of fishing and oystering in the River.

These disagreements resulted in the unilateral abrogation of the compact of 1785 by the General Assembly of Maryland by the passage of Ch. 766 of the Acts of 1957. Virginia soon thereafter filed a complaint in the Supreme Court of the United States seeking to have the compact declared forever binding on Maryland and Virginia. The Court referred the case to Mr. Justice Stanley Reed, retired, as Special Master and a stay was ordered to permit the reaching of an agreement. The Governors of the two

states appointed commissioners to resolve the differences, and the proposed compact of 1958 resulted from their efforts. The General Assembly of Virginia approved it, as did the General Assembly of Maryland by the passage of Ch. 269 of the Acts of 1959.

The Act was forced to referendum in Maryland by the signatures of almost 13,000 voters under the provisions of Art. XVI of the Maryland Constitution. At the election of November 8, 1960, some 449,347 voters recorded their preferences as to the Act, 244,510 citizens voting for its adoption and 204,837 against.

The manner in which the text of Ch. 269 of the Acts of 1959 was published is the primary target of the appellants.

The Maryland Constitution, by Art. XVI, Sec. 5(a), provides that "The General Assembly shall provide for furnishing the voters of the State the text of all measures to be voted upon by the people; provided, that until otherwise provided by law the same shall be published in the manner prescribed by Article XIV of the Constitution for the publication of proposed Constitutional Amendments." Article XIV requires publication before the election "in at least two newspapers, in each County, where so many may be published" and in three newspapers in Baltimore City "once a week for four weeks." By Chapter 335 of the Acts of 1941 (codified as Sec. 208 of Art. 33 of the Code of 1951) the Legislature specified that the text of a referred law should be furnished the voters by publication "once in some daily newspaper of general circulation throughout the State." This continued to be the law until the passage of Ch. 739, Sec. 170, of the Acts of 1957 (codified as Art. 33, Sec. 170), which requires publication by "at least by one insertion in two or more newspapers within the several counties of the State and in all the daily newspapers published in Baltimore City which will publish the same at the current rate of commercial advertising."

Because the employees of the Secretary of State's office continued to publish according to the 1941 law, instead of complying with the revisions of the Acts of 1957, the text of Ch. 269, the proposed compact, was published but once, in one newspaper, the Baltimore Sun, a paper which has a general circulation throughout the State, although of late years in many counties its readers are few in comparison to the total population. The texts of proposed constitutional amendments which were to be voted on at the same election of 1960 were published in fifty-three County papers and in three Baltimore City papers. It is not contended that the mistake in the publication of the text of the compact was other than unintentional.

The appellants argue that the constitutional and statutory provisions are mandatory and, therefore, the failure to follow them strictly invalidates the favorable vote on the compact. The appellee replies that after an election has been held, the courts treat such requirments as directory, that they were substantially complied with, and the failure to follow them strictly was not shown to have affected the results of the vote.

In reaching a decision, we treat the implementation by Code (1957), Art. 33, Sec. 170, of the constitutional mandate that the electorate be "furnished" the text of referred laws as establishing a statutory, rather than a constitutional, method of procedure. There are many ways in which the constitutional imperative that the content of referred laws be made available to the voters could be gratified. One is the way the Legislature deemed adequate from 1941 to 1957. If the election now challenged had been held in the first five months of 1957 no serious objection could have been made that the text of the compact had not been properly and adequately "furnished" the electorate. The 1957 Act substituted one statutory method for another. We test the adequacy of compliance with the 1957 Act by the standards the Courts have applied to statutes specifying the manner and extent of notice of elections or of the publication of issues to be voted on in elections.

The Maryland cases, like those elsewhere, have held that there is a clearly recognized difference between the effect given to modal provisions of the election laws before election and the effect of the same provisions after election. Election officials of course should do what the law tells them to do and, before election, a court will require that they do their duty. Yet if the election has been held before court action is sought and it is not shown that the failure of the officials to follow the law has interfered with the full and fair expression of the will of the voters, that expressed choice will not be disturbed by the Courts. Wilkinson v. McGill, 192 Md. 387, 393, 64 A. 2d 266; Graham v. Wellington, 121 Md. 656, 661, 89 A. 232; Seyboldt v. Town of Mt. Ranier, 130 Md. 69, 73, 99 A. 960; Carr v. Town of Hyattsville, 115 Md. 545, 549-550, 81 A. 8. The latest statement of the rule in this Court was in Lexington Park Volunteer Fire Department v. Robidoux, 218 Md. 195, 200, 146 A. 2d 184, 186: "It is generally held that an election which has been honestly and fairly conducted will not be vitiated by mere failure to follow the statute precisely unless the result is shown to have been affected or the statute expressly states that such failure renders the election void. After the election is held, statutes giving direction as to the mode and manner of conducting it are generally construed as directory, unless the deviation from the prescribed forms of the law had so vital an influence as probably to have prevented a free and full expression of the popular will. The courts reason that it would be unjustifiable to defeat the expressed will of the electorate if the irregularity did not frustrate or tend to prevent a free expression of the electors' intention or otherwise mislead them."

Appellants rely primarily on Baltimore and Drum Point Railroad Company v. Pumphrey, 74 Md. 86, 21 A. 559; County Commissioners of Montgomery County v. Henderson, 122 Md. 533, 89 A. 858; and Graf v. Hiser, 144 Md. 418, 125 A. 151, as holding the modal requirements of the election laws mandatory. The cases are distinguishable. In the County Commissioners case aid of the Court was sought

before election and in Graf v. Hiser the result of the election was deemed to have been affected by the irregularity.

Although two elections were involved in the Drum Point case, the decision turned on the interpretation of Art. III, Sec. 54, of the Maryland Constitution, which provides that no county shall give or loan its credit to an association or corporation unless authorized to do so by an act of the Legislature "which shall be published for two months before the next election for members of the House of Delegates * * * and shall also be approved by a majority of all the members elected to each House of the General Assembly at its next session after said election." The Court held that an act authorizing Anne Arundel County to lend its credit to a railroad company, passed in 1872 (which provided for a referendum at an election that should have been held on the fourth Monday in April 1873, but was held on the fourth Monday in April 1872), and a confirmatory act of 1874, were not valid because there had not been a publication of the act of 1872 for two months before the election of the members of the House of Delegates in November 1873 as prescribed by the constitution. The Court held that the two months' publication was one of the essential conditions precedent to a valid confirmatory act, and since all constitutional requirements had not been complied with, the authority attempted to be conferred upon the county had never been validly conferred.

The election cases hold generally that if a statute specifies that failure to follow its procedure shall invalidate the election, the required procedures must be followed or there is no valid election and the holding of the Court in the Drum Point case in effect was that it was implicit in the constitutional requirement that the failure to follow its prerequisites would invalidate subsequent action.

Appraising the case before us by the standards of the decided cases, it is clear there was no substantial compliance with the statutory requirements as to publication. Reproduction of the text of an Act in one paper, when the statute directs reproduction in fifty-six papers, cannot be

stretched to amount to substantial compliance. We think, however, that the record shows there was substantial, if not full, achievement of the purposes of the statute to acquaint the electorate fully with the law involved, and nothing to show that the deviation from the prescribed mode of acquainting, misled the voters or prevented, frustrated or interfered with a free, full and intelligent expression of the popular will. In the months before the voting, the Baltimore Sun published seventeen articles and four editorials on the compact and the Baltimore News-Post six articles and four editorials. The Washington Post and Washington Evening Star, which are widely read in Southern Maryland, and in Montgomery and Frederick Counties, published respectively six articles and one editorial and twelve articles and three editorials. There were various articles and editorials published in papers in sixteen of the Counties.

There were published in all some one hundred twenty-two articles, in many of which the views pro and con of public officials and prominent citizens as to various aspects of the compact were reported at some length. There were published throughout the State many letters to the editors, some one way, some the other. There were numerous radio and television news broadcasts relating to the proposed compact, including a purchased television program at which those who share appellants' views as to the undesirability of the compact attempted to persuade the electorate to see things their way. William J. McWilliams, Esquire, of the Maryland Bar, delivered a speech discussing exhaustively all of the aspects and particulars of the proposed compact on June 18, 1959, before lawyers from all over the State assembled at Atlantic City for the meeting of the Maryland State Bar Association. The speech was printed in full in the Daily Record of June 19, 1959. The Official Specimen ballot which contained a brief summary of the contents of Ch. 269 (as did, it would appear from the record, the sample ballots distributed by both of the major political parties) was published in fifty-three County papers and in three in Baltimore City.

The total vote on the compact of 449,347 was larger than that cast for and against all but two of the fifteen constitutional amendments voted on at the same time. It was 42½% of the 1,055,346 votes case for President in Maryland in 1960. In 1956 some 932,000 Maryland votes were recorded in the presidential election. The highest total vote that year on a referred question was 42½% of the presidential total, or 394,773 votes on a constitutional amendment as to absentee voting by the physically disabled. Maryland Manual 1959-1960, pp. 383, 392. In 1952 the percentage of the highest vote on a referred law was 42⅛% of the presidential total. Maryland Manual 1953-1954, pp. 305, 309.

The appellee has produced figures showing the number of votes cast for President, and on each of the fifteen amendments (which were fully advertised), and on the compact, in each of the Counties of the State and in Baltimore City. The average vote on questions in relation to the vote on presidential cadidates varied from a high of 57.58% in Baltimore County to a low of 12.54% in Somerset County. In twenty-one of the twenty-three Counties and in Baltimore City the vote on the compact was greater than the average vote on all the questions. In Baltimore City and in Baltimore County, where the Sun, in which the text of the compact was printed, has its largest circulation, the average percentages and the compact percentages were, respectively, 33.93% and 34.60%, and 57.58% and 56.79%. In Allegany County the average percentage was 17.71% and the compact percentage was 25.34%. In Somerset County the average was 12.54% and the compact average was 30.90%. In Washington County the percentages were 23.63% and 31.78%, and in Calvert County 26.16% against 36.41%. Mongomery County showed 57.72% to 61.42%.

We cannot assume that the almost 450,000 people who voted on the compact, or any substantial proportion of them, did not understand the issue on which they voted. A contention that the voters of Baltimore did not know what they were doing when they approved the airport

loan of 1927 because the whole ordinance was not printed on the ballot was rejected in Douty v. Mayor & City Council of Baltimore, 155 Md. 125, 138, 141 A. 499, 503, where Judge Sloan said for the Court: "* * * we cannot now assume that more than 66,000 voters who endorsed the project and the loan did not know what they were voting for."

In factual situations comparable to that before us, courts have supported the upholding of elections despite only partial compliance, or even non-compliance, with modal provisions as to notice or the holding of elections on various grounds. Some have found substantial compliance with statutory requirements, others have said that provisions would be construed as mandatory before election but as directory after the election had been fairly held. The latter reasoning, as we have suggested earlier, may be an imprecise, if not inaccurate, rationalization of what Judge Marbury said for the Court in Wilkinson v. McGill, supra, at page 393 of 192 Md., at page 269 of 64 A. 2d, that when an election has been held and it is not shown that the failure of election officials to hew strictly to the statutory line has prevented a full and fair expression of the will of the voters the Courts will not disturb the result. All of the cases turn fundamentally on whether the mistake in procedure has caused harm by misleading the electorate or by tending to prevent or frustrate an intelligent and full expression of the intent of the voters.

A number of courts have held that achievement of the result intended by the requirement of statutes as to notice or publication — that is, the apprising of the voters of the issue to be voted on — by non-statutory methods, such as newspaper, radio and television discussions or private advertisements or circulars, will be enough to uphold an election at which there was a full and apparently free vote. 3 McQuillin, Municipal Corporations (3rd Ed.), Sec. 12:10, pp. 77-78, says that whether provisions are regarded as mandatory or directory the rule usually applied is that irregularities which do not affect the result of an election will not invalidate it, for the courts prefer to give effect

to the popular will, and adds in Sec. 12:12, p. 94: "But an election will be sustained, notwithstanding the want of the usual proclamation or other prescribed notice, or defect in giving the required statutory notice, if the electors had general knowledge of it, and a reasonable number of votes were polled." See also 29 C.J.S. Elections § 74, p. 100.

In Groom v. Port of Bellingham, 189 Wash. 445, 65 P. 2d 1060, the prescribed statutory notice of an election covered the matters of certain port and public utility districts but gave no notice whatever of a resolution of the Commissioners of Bellingham to improve its harbor and to issue bonds to pay for the improvements which was also to be voted on. The approval at the election of the harbor improvements and the issuance of the bonds was challenged. The Court stated the general rule that an election will not be declared invalid for irregularities when it appears that the result was an "intelligent expression" of the popular will and the want of statutory notice did not deprive enough voters of their franchise to change the result, and said (65 P. 2d at pages 1060-1061):

> "To this election, aside from the election notice, there was given wide publicity. The matter of the improvement of the port and the issuing of the bonds was discussed in the newspapers, over the radio, at public meetings, and 30,000 copies of the official ballot, which carried the propositions here in question, were circulated generally and extensively to the voters throughout the county. Appearing upon the election ballot at the general election, there were constitutional amendments, initiatives, referendums, and other propositions, and upon these approximately the same number of votes were cast as were cast upon the port propositions. A port commissioner was elected, and the vote cast for port commissioner was likewise practically the same as the vote upon the propositions stated."

and then concluded:

> "In the case now before us, if the election notice had contained the propositions referred to and there

had been given no further publicity to the matter whatever, the election would have conformed to the law and would have been valid. So far as advising the voters was concerned, the publishing and posting of the notice would have been merely nominal in comparison with what was done in this case in an endeavor to bring to the attention of the voters of Whatcom county the propositions that they were to vote upon relative to the port. It may be true, and probably is, that no one failed to vote upon the propositions because they did not appear upon the election notice. It unquestionably is true that not a sufficient number of the voters failed to vote to change the result of the election. The vote was such, as compared with the votes upon other propositions, as to indicate an intelligent and well-informed expression of the popular will."

See also Vickers v. Schultz, 195 Wash. 651, 81 P. 2d 808, 810; and Shaw v. Shumway, 3 Wash. 2d 112, 99 P. 2d 938, 941.

The same reasoning was followed by the Supreme Court of Wisconsin in Commonwealth Telephone Co. v. Public Service Commission, 219 Wis. 607, 263 N.W. 665, 668 ("Information actually given the electors by the notices, official and otherwise * * * and in the other unofficial publications and circulars in relation to the issue * * * were undoubtedly as widespread and ample as the electors would have received from notices published in strict compliance with the statutes."); and in Bay County v. Hand, 257 Mich. 262, 241 N.W. 256, 258 ("The record is wholly to the effect that the matter was given widest publicity by public discussion throughout the county and by the press and otherwise, and is likewise to the effect that the irregularities were without prejudice, and they will therefore be held not fatal to validity of bonds") and in Commonwealth v. Kelly, 255 Pa. 475, 100 A. 272, 274. See also Michigan Public Service Co. v. City of Cheboygan, 324 Mich. 309, 37 N.W. 2d 116, 128; Flake v. Board of Commissioners, 192 N.C. 590, 135 S.E. 467; Phillips v. City of Rock Hill, 188

S.C. 140, 198 S.E. 604, 607, 119 A.L.R. 656. Oklahoma followed the same reasoning as to a constitutional requirement in State ex rel. McNeill v. Long, 178 Okl. 409, 63 P. 2d 60, 62.

In Gollar v. City of Louisville, 187 Ky. 448, 219 S.W. 421, the Court of Appeals of Kentucky upheld an election at which a bond issue had been approved, although the direction of the ordinance authorizing the bonds that its text be published in each of the daily morning and afternoon papers in Louisville for at least ten days prior to the day of election had been completely ignored. The Court noted that newspaper publicity had been long and extensive and that there had been placards, posters and moving picture "flashes" as to the bond issue — which it characterized as "a literal bombardment of publicity," and said (219 S.W. at page 422):

> "It is difficult to see how much greater publicity could have been given to the matter, and it would seem almost impossible, with these matters so constantly and continuously before them, that many citizens of Louisville could have failed to know and understand the nature, the object, the need, and the purpose of the bond issue. True, the ordinance in its entirety was not embodied in any of the articles of advertisements, but the main points were featured time and again. The object sought by publication is to bring the ordinance to the attention of the people, that they might be thoroughly posted and advised of its import, and thus enabled to vote intelligently upon the measure."

We conclude that, as in the cases discussed above, there is no real indication, much less a showing, that the voters were not as fully informed about the proposed compact as they would have been had the text been published in fifty-six newspapers, as the current statute contemplated, rather than in one. We see no persuasive evidence that the will of the electorate was not knowingly, fully and freely expressed, unaffected to any discernible extent by the

failure to publish the text as extensively as prescribed, and hold that Ch. 269 of the Acts of 1959 was effectively approved by the voters of the State on November 8, 1960.

We pass to the matters as to which the appellants sought declarations of unconstitutionality. They allege that the Act must fall under Art. III, Sec. 29, of the Maryland Constitution for the failure of its title to have fairly advised the Legislature and the people of the real nature of the bill. The title states that the bill is an act to ratify the compact of 1958 with Virginia, which established a joint commission with the duties of conserving the fishery resources and managing and controlling fisheries in a portion of the Potomac River, and which established a system of licenses "for the taking of fishery resources" from the River by the citizens of both states and which related "generally to the supply, management, control, conservation, taking and use of the fishery resources in a portion of the Potomac River between the State of Maryland and the Commonwealth of Virginia and to the powers and duties of the said joint commission and of the citizens of the two states with relation to these fishery resources * * *" and which provided for the codification of the compact.

The appellants complain that there is no reference in the title to the fact that (a) existing licenses are to be cancelled six months after the effective date of the Act, (b) Virginia Courts are empowered to try Maryland citizens for crimes committed on the River and to confiscate their boats and equipment, (c) Maryland laws as to finfish are frozen as of December 1, 1958, and (d) Maryland agrees to make annual appropriations for the expenses of administering the compact of not less than $50,000.

We have held often, and recently, that while a title must fairly indicate the subject of the legislation, it need not give an abstract of the act or specify the means by which the purposes are to be accomplished, as long as it is not misleading. Allied American Mut. Fire Ins. Company v. Commissioner, 219 Md. 607, 614, 615, 150 A. 2d 421;

Leonardo v. Board of County Commissioners, 214 Md. 287, 299, 300, 134 A. 2d 284; Board of County Com'rs of Prince George's County v. Donohoe, 220 Md. 362, 366, 367, 152 A. 2d 555; Jacob v. Klawans, 225 Md. 147, 153, 169 A. 2d 677.

We see nothing misleading in the title now challenged, and think it described the legislation with fairness and sufficient fullness to meet the constitutional requirements in Art. III, Sec. 29, that "* * * every Law * * * shall embrace but one subject, and that shall be described in its title * * *."

The remaining matters which appellants ask the Court to declare unconstitutional are largely those the omission of which from the title they contend made it defective, that is, legislative power has been abdicated and unpermissibly delegated, and the State of Virginia has been authorized to police crime on the Potomac, a Maryland river, and to try Maryland citizens in its Courts for crimes committed on the River.

It cannot be doubted that the power to make a contract by statute, that is to say, a compact, with a sister state, is a power inherent in sovereignty limited only by the requirement of Congressional consent under Art. I, Sec. 10, of the Constitution of the United States. Chesapeake & Ohio Canal Co. v. Baltimore & Ohio Railroad Co., 4 Gill & J. 1, 129, et seq.; Frankfurter and Landis, The Compact Clause of the Constitution, a Study in Interstate Adjustments, 34 Yale L.J. 685. The use of a compact for the execution of governmental functions is not an abdication but an exercise of government. "The compact — the legislative means — adapts to our Union of sovereign States the age-old treaty making power of independent sovereign nations," as Mr. Justice Brandeis said for the Court in Hinderlider v. La Plata R. & Cherry Creek D. Co. 304 U.S. 92, 104, 58 S. Ct. 803, 808, 82 L. Ed. 1202, 1209.

It has been held that the states of the Union may validly agree by compact with other states to delegate to interstate commissions or agencies legislative and administrative powers and duties. Hinderlider v. La Plata R. &

Cherry Creek D. Co. supra; State of West Virginia ex rel. Dyer v. Sims, 341 U.S. 22, 71 S. Ct. 557, 95 L. Ed. 713; Application of Waterfront Commission of New York Harbor, 39 N.J. Super. 33, 120 A. 2d 504, 509. The Sims case also held that the contract of a state to provide annually its respective proportion of the expenses of an interstate commission was binding and enforceable. See also Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275, 79 S. Ct. 785, 3 L. Ed. 2d 804; New York v. O'Neill, 359 U.S. 1, 79 S. Ct. 564, 3 L. Ed. 2d 585; and annotation in 134 A.L.R. 1411.

We note also in passing that it has long been established that where the middle of a river or one of the shores of the river is a boundary between two states, these neighbors may establish concurrent jurisdiction over the whole river by compact. Where this is done each of the states has jurisdiction from shore to shore so that the court before which the offender or the subject of legal adjudication, prosecution or trial, is first brought finally determines the case. The cases have reasoned that if the laws of both states make the same act or omission criminal, each state, in carrying out the concurrent jurisdiction, does so permissibly in the enforcement of its own laws. See Rorer, American Interstate Law, 2nd Ed., 438 et seq.; State v. Cunningham, 102 Miss. 237, 59 So. 76; State v. Federanko, 26 N.J. 119, 139 A. 2d 30; People v. Central R. R. Co. of N.J., 42 N.Y. 283; Olin v. Kitzmiller, 259 U.S. 260, 42 S. Ct. 510, 66 L. Ed. 930; Hendricks v. Commonwealth, 75 Va. 934; State v. Kurtz, 317 Mo. 380, 295 S.W. 747; Lemore v. Commonwealth, 127 Ky. 480, 105 S.W. 930; State v. Mullen, 35 Iowa 199; State v. George, 60 Minn. 503, 63 N.W. 100; Padgett v. State, 151 Ark. 290, 236 S.W. 603; Means v. State, 118 Ark. 362, 176 S.W. 309; State v. Catholic, 75 Or. 367, 147 P. 372.

In the view we take of the case, however, we think appellants are not entitled to have a declaration as to the constitutionality of the compact in operation. They have not shown that they are engaged in or faced with actual controversy, or that the issues are ripe and justiciable

so as to be able to call upon the courts to exercise the declaratory process. Hammond v. Lancaster, 194 Md. 462, 471, 71 A. 2d 474; Hitchcock v. Kloman, 196, Md. 351, 355, 76 A. 2d 582; Tanner v. McKeldin, 202 Md. 569, 97 A. 2d 449; Givner v. Cohen, 208 Md. 23, 37, 116 A. 2d 357. Appellants do not show that the provisions of the Act of which they complain will affect any legal interests they possess or that they present immediate dangers or inevitable litigation against them except to allege that they may be tried in Virginia courts for "alleged offenses" on a Maryland river and that they will suffer "irreparable damage" by reason of the "illegal expenditure" for the expenses of administering the compact. It was held in Hitchcock v. Kloman, supra that the fact a criminal penalty overhung the petitioner for declaratory relief if he acted as he claimed a right to act, would not of necessity call for a declaration as to the constitutionality of his doing what he wished to do. This Court said in Hammond v. Lancaster, at page 477 of 194 Md., at page 481 of 71 A. 2d, supra:

> "We think, however, that none of the other provisions of the Act are properly before us. The only alleged waste of public funds, except in regard to the referendum, is in the expense of enforcing and administering the Act. But we are referred to no Maryland case holding that to be a sufficient interest. On the other hand, the Supreme Court cases clearly indicate that it is beyond our power to adjudicate constitutional issues at the instance of taxpayers not directly affected. None of the complainants have been threatened with prosecution, nor do they allege any facts to indicate that they have violated, or are about to violate, any of the criminal provisions of the Act."

The decree appealed from, to the extent that it held that Ch. 269 of the Acts of 1959 was, on its face, a constitutional enactment with was validly approved and ratified by the voters on November 8, 1960, and its dismissal of the Bill is affirmed.

Decree affirmed, with costs.

MARBURY, Judge (dissented).

With regret I find myself in disagreement with the majority opinion dealing with the adequacy or inadequacy of the publication of the text of Chapter 269 of the Acts of 1959 (the Potomac River Compact of 1958) prior to the vote taken on November 8, 1960. It has been said that the only useful purpose in filing a dissenting opinion is perhaps to underscore what the *law is not* and to point up what it *ought to be*. In this instance I am so deeply concerned with the precedent established by the majority opinion that I feel constrained to express my own views with reference to the constitutional principles here involved.

The majority hold that constitutional and statutory provisions are mandatory before an election, but that statutory provisions are directory only after the election, so that the result of the election may only be successfully contested by showing that the inadequacy of publication might reasonably be supposed to have affected the result. They candidly concede that the publication of the text of Chapter 269 in only one of fifty-six newspapers was not in substantial compliance with Article 33, §170, as enacted by Chapter 739 of the Acts of 1957, which was in implementation of Article XVI, §5(a) of the Constitution; and treat the requirement that furnishing of the text of referred laws, as required by §170, establishes a statutory rather than a constitutional requirement. They draw a distinction between violation of a mandatory constitutional provision, Baltimore and Drum Point Railroad Company v. Pumphrey, 74 Md. 86, 21 A. 559, and violation of a mandatory statutory provision and hold that the mandatory provision of the statute before the election becomes directory only after the vote has taken place. I can not find this distinction to be valid.

The referendum article of the Constitution, Article XVI, §1(b), provides that "The provisions of this Article shall be self-executing; provided that additional legislation in furtherance thereof and not in conflict therewith may be enacted." Section 5(a) of the same Article requires that

"The General Assembly shall provide for furnishing the voters of the State the text of all measures to be voted upon by the people; provided, that until otherwise provided by law the same shall be published in the manner prescribed by Article XIV of the Constitution for the publication of proposed Constitutional Amendments." Article XIV, §1 requires that a bill proposing an amendment to the Constitution shall be published by order of the Governor, in at least two newspapers, in each County, where so many be published, and where not more than one may be published, then in that newspaper, and in three newspapers published in the City of Baltimore, once a week for four weeks immediately preceding the next ensuing general election, at which the proposed amendment shall be submitted.

As pointed out in the majority opinion, the Legislature first implemented Article XIV, §5 by the passage of Chapter 335 of the Acts of 1941 (codified as Code, 1951, Art. 33, §208). This required the publication of referred laws at least once in some daily newspaper of general circulation throughout the State. This remained the law until the passage of Chapter 739 of the Acts of 1957 (now codified as Art. 33, §170), which in substance changed the law to read substantially as provided in Article XIV, §1 of the Constitution before any legislative enactment on the subject was passed. It is obvious that both Chapter 335 of the Acts of 1941 and Chapter 739 of the Acts of 1957 carried mandatory provisions as to the publication of referred laws, as did Article XIV, §1 of the Constitution. They were, therefore, in conformity with Article XVI, §1(b), since they were in furtherance of and not in conflict with that Article. Had the Legislature, in enacting either the 1941 Act or the 1957 Act, undertaken to have substituted the directory word "may" for "shall" as provided in Article XIV, §1, it is obvious that this attempt would have been repugnant to and in contravention of the mandatory provision of that Article of the Constitution. Since the General Assembly was powerless to pass an act which would be clearly unconstitutional, how can it be said that the courts may do this by construing the word "shall" as mandatory before

the election and directory thereafter? The answer must be in the negative. The provisions of the Constitution and the laws enacted pursuant thereof are binding upon all branches of the government and the citizens of the State, and can not be disregarded by tenuous interpretation by the courts.

Since Article 33, §170, by the express provisions of Article XVI, §1(b), is in *pari materia*, the former can only be construed in its literal constitutional sense. In the language of Judge Cooley, quoted in Archer v. State, 74 Md. 443, 448, 22 A. 8, 9, in discussing mandatory and directory constitutional provisions, it is said:

> "Courts tread upon very dangerous ground when they venture to apply the rules which distinguish directory and mandatory statutes to the provisions of a Constitution. Constitutions do not usually undertake to prescribe mere rules of proceeding, except when such rules are looked upon as essential to the thing to be done; and they must be regarded in the light of limitations upon the power to be exercised. It is the province of an instrument of this solemn and permanent character to establish those fundamental maxims, and fix those unvarying rules by which all departments of government must at all times shape their conduct. * * * We are not, therefore, to expect to find in a Constitution provisions which the people in adopting it have not regarded as of high importance, and worthy to be embraced in an instrument which, for a time at least, is to control alike the government and the governed, and to form a standard by which is to be measured the power which can be exercised as well by the delegate as by the sovereign people themselves. If directions are given respecting the times or modes of proceeding in which a power should be exercised, there is at least a strong presumption that the people designed it should be exercised in that time and mode only; and we impute to the people a want of due appreciation of the purpose and proper province of such an instrument when we infer that

> such directions are given for any other end. Especially, as has already been said, it is but fair to presume that the people in their Constitution have expressed themselves in careful and measured terms, corresponding with the immense importance of the powers delegated, and with a view to leave as little as possible to implication. Cooley Const. Lim. (3d Ed.) 78, 79."

See 16 C.J.S. Constitutional Law §61; dissenting opinion of Judge Phelps in State ex rel. McNeill v. Long, 178 Okl. 409, 63 P. 2d 60, 65, a five to four decision.

The appellee's contention, which was embraced in the majority opinion, that in spite of the almost total disregard of the statutory provision as to publication of the text of Chapter 269, there is no showing that the voters were misinformed or misled when they voted in favor of its adoption is not persuasive. While it is true that much publicity was given the fact that an election was to be held, at which the voters would be called upon to vote upon this referred question, by means of newspaper articles, editorials, radio and television programs, in which the writers or speakers gave their views pro and con, this was not the mode of information envisaged in the constitutional and statutory requirements as to publishing the text of the referred law. There was much discussion through these news media, some of which dealt with only portions of the Act, some from the point of view of the proponent or opponent, with varying degrees of accuracy, which leaves the question open as to whether the electorate was fairly informed as to the subject matter of the Act.

While it may be true that the average citizen does not read the text of referred laws in his county or city paper, nevertheless a number of publicly interested citizens do read them and these, on the basis of their opportunity to familiarize themselves with the text, can materially aid in formulating public sentiment for or against proposed legislation. This was the intent of the framers of the Constitution, and undoubtedly that of the Legislature when it amended that section of the election laws in 1957. Until the Constitution, or a statute passed pursuant thereto, pro-

vides some other means for informing the people, I think the courts are not at liberty, in the enforcement of a statute, to disregard any mandate or requirement of the organic law of the State. The need for adherence to strict interpretation of the Constitution and laws of the State becomes overwhelmingly apparent where, as in this case, it is sought to submit to the voters of the State an act which would amend the compact between Virginia and Maryland, which has existed since 1785.

I would reverse the chancellor's decree because of the non-compliance with the requirement as to publication of the text of this law.

APPENDIX B

Mandate of Court of Appeals of Maryland

June 12, 1961: Decree affirmed, with costs.

Decree of Circuit Court of Baltimore City

The above entitled case having come on for hearing upon the Bill of Complaint, Answer thereto and Motions for Summary Judgment filed by the respective parties, and this Court having found that there was no substantial dispute of fact and that the matter was principally one of law; and the Court having fully considered the arguments and memoranda of counsel and having further read all exhibits, affidavits, depositions and answers to interogatories filed in the case, it is (for the reasons set forth in the Memorandum Opinion of the Court dated January 11, 1961) this 19th day of January, 1961, by the Circuit Court of Baltimore City

Ordered, Adjudged and Decreed:

1. That Chapter 269 of the Acts of 1959 is constitutional.

2. That the Court finds that there was a full and free expression of the popular will on the referred question, as more fully set forth in the proclamation of the Governor of this State dated December 1, 1960, declaring that

Chapter 269 of the Acts of 1959 was approved by the voters.

3. That the voters of this State duly ratified and approved the enactment of said Chapter 269 of the Acts of 1959 at the general election held on November 8, 1960; and it is

FURTHER ORDERED, ADJUDGED AND DECREED that the Bill of Complaint be and the same is hereby dismissed; and it is

FURTHER ORDERED that the Complainants pay the costs of these proceedings.

ANSELM SODARO,
Judge.

APPENDIX C

PERTINENT TEXT OF CHAPTER 269 OF THE LAWS OF MARYLAND OF 1959.

Title

AN ACT to approve, confirm and ratify on the part of the State of Maryland a Compact entered into by the State of Maryland and the Commonwealth of Virginia at Mount Vernon, Virginia, on December 20, 1958, and entitled "The Compact of 1958", by Commissioners earlier appointed by the respective Governors of Maryland and Virginia, establishing a joint Commission representing the State of Maryland and the Commonwealth of Virginia to conserve and maintain the fishery resources of a portion of the Potomac River, providing for the conservation, management and control of the fisheries in the designated portion of the Potomac River, establishing a system of licenses for the taking of fishery resources from the River by citizens of both states, and relating generally to the supply, management, control, conservation, taking and use of the fishery resources in a portion of the Potomac River between the State of Maryland and the Commonwealth of Virginia and to the powers and duties of the said joint commission and of the citizens of the two states with relation to these

fishery resources; and providing that "The Compact of 1958" be codified in and become a part of the Annotated Code of Maryland (1957 Edition), as Section 261A of Article 66C, title "Natural Resources", sub-title "Fish and Fisheries", to follow immediately after Section 261 thereof and to be under the new sub-heading "Compact of 1958".

* * * * * *

Article V, Section 2

Penalties. The violation of any regulation of the Commission shall be a misdemeanor. Unless a lesser punishment is provided by the Commission, such violation shall be punishable by a fine not to exceed one thousand dollars ($1,000.00) or confinement in a penal institution for not more than one (1) year, or both, in the discretion of the court, and any vessel, boat, or equipment used in the taking of finfish, crabs, oysters, clams, or other shellfish from the Potomac River in violation of any regulation of the Commission or of applicable laws may be confiscated by the court, upon the abandonment thereof or the conviction of the owner or operator thereof.

Article V, Section 3

Jurisdiction of Court. The officer making an arrest or preferring a charge for violation of a regulation of the Commission or an applicable state law respecting the waters within the Commission's jurisdiction shall take the alleged offender to a court of competent jurisdiction in either State, in a county adjacent to the portion of the Potomac River where the alleged offense occurred, which shall thereupon have jurisdiction over the offense.

* * * * * *

Article VI, Section 2

Appropriations. The said Governors shall place in the proposed Budget of their respective states for each year the sum of not less than Fifty Thousand Dollars ($50,000.00) for the expenses and the other purposes of the Commission for that year, except that none of the sum so appro-

priated shall be used for law enforcement purposes; and the General Assembly of each of the two states agrees to appropriate annually not less than this sum to the Commission.

* * * * * *

Article VII, Section 2

Existing Laws. The laws of the State of Maryland relating to finfish, crabs, oysters, and clams in the Potomac River, as set forth in Article 66C of the Annotated Code of Maryland and as in effect on December 1, 1958, shall be and remain applicable in the Potomac River except to the extent changed, amended, or modified by regulations of the Commission adopted in accordance with this Compact.

Article VII, Section 3

Existing Licenses. The rights and privileges of licensees to take and catch finfish, crabs, oysters, clams, and other shellfish in the Potomac River, which are in effect at the time this Compact becomes effective, shall continue in force for a period of six months at which time every such license and every such right and privilege shall be abrogated.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 533

JAMES W. DUTTON, ET AL.,
Appellants,

v.

J. MILLARD TAWES, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF MARYLAND,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

NO. ------

JAMES W. DUTTON, ET AL.,
Appellants,

v.

J. MILLARD TAWES, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF MARYLAND,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

MOTION TO DISMISS OR AFFIRM

The Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves to dismiss or affirm on the following grounds:

(a) The Federal question sought to be reviewed was not raised before the Circuit Court of Baltimore City, nor was it expressly passed upon by the Court of Appeals of Maryland;

(b) The appeal is not within the jurisdiction of this Court because it has not been taken in conformity with statute; and

(c) This appeal does not present the question sought to be reviewed or any substantial Federal question, and the judgment rests on an adequate non-Federal basis.

STATEMENT

This is an appeal from a decision of the Court of Appeals of Maryland affirming the decree of the Circuit Court of Baltimore City (Anselm Sodaro, Judge). The opinion is reported in 225 Md. 484, 171 A. 2d 688.

This case arose out of a complaint filed by the Appellants in the Circuit Court of Baltimore City seeking a declaratory decree that the text of Chapter 269 of the Laws of Maryland of 1959 (which Act ratified a compact between the State of Maryland and the Commonwealth of Virginia relating to the regulation of fishery in the Potomac River) had not been published in accordance with the requirements of Section 5 of Article XVI of the Maryland Constitution and therefore not legally adopted. The complaint alleged that Chapter 269 of the Acts of 1959, *supra*, had been referred to the voters of the State of Maryland in conformity with the referendum provisions of Article XVI of the Constitution of Maryland, and that said Act was placed upon the ballot in the general election held on November 8, 1960. The complaint further alleged that the text of Chapter 269 was not published in sufficient newspapers within the State of Maryland, as required by Article 33, Section 170, of the Annotated Code of Maryland (1957 Ed.), which was enacted in compliance with the mandate of Section 5(a) of Article XVI of the Constitution of Maryland. The gravamen of the complaint further alleged that the failure to publish the text of Chapter 269, *supra*, made the election on said referendum null and void and of no effect. It was collaterally alleged that Chapter 269 was unconstitutional in that it violated Articles 4 and 5 of the Declaration of Rights of the Constitution of Maryland, and

was further unconstitutional in that it violated Section 29 of Article III of the Maryland Constitution because the title of the bill was insufficient. Nowhere in the complaint itself or in the prayers for relief was it alleged that the Appellants had been deprived of due process of law under the Fourteenth Amendment to the Constitution of the United States, nor that they or any of them had been denied equal protection of the law as set forth in the Fourteenth Amendment to the Constitution of the United States.

The Appellee filed a combined demurrer and answer, neither of which alluded to the Fourteenth Amendment to the Constitution of the United States. The principal defense of the Appellee was that the said election was conducted fairly and that there was a full and free expression of the popular will on the issue involved. The trial court ruled that the total recorded vote of 449,347 indicated that there was a full and free expression of popular will on the issue, notwithstanding the lack of full compliance with the provisions of the statute involved. In the trial court's opinion there is no mention whatsoever of the Fourteenth Amendment to the Constitution of the United States.

The Appellants thereupon noted an appeal to the Court of Appeals of Maryland and in their brief the Appellants neither alleged nor argued that the failure to fully publish the text of Chapter 269, *supra*, deprived them of any right guaranteed under the Fourteenth Amendment, nor that Chapter 269, *supra*, deprived them of due process of the law or equal protection of the law.

HISTORICAL FACTS

In order for the Court to comprehend the importance and scope of this case, the Appellee believes it necessary to present to the Court a brief historical summary of the

relations between Maryland and Virginia concerning the Potomac River. Historically, both the State of Maryland and the Commonwealth of Virginia have laid claim to the entire Potomac. These conflicting claims stem from grants made by successive kings of England in the Seventeenth Century. In 1609, James I granted to the Commonwealth of Virginia a tract of land extending 200 miles northward from Point Comfort. Virginia, therefore, claimed part of South Carolina, all of North Carolina, all of Maryland, all of Delaware and approximately one-half of Pennsylvania from ocean to ocean. In 1632, Charles I made a grant to Lord Baltimore, which included substantially what is now the State of Maryland, the south boundary of which was described as the "farther bank of the Potomac River". In 1688, James II granted unto Lord Culpepper what is now known as the Northern Neck of Virginia including the Potomac River and all of the islands within the outermost banks thereof.[1]

These conflicting grants led to considerable controversy between Maryland and Virginia both before and immediately after the Declaration of Independence. Virginia, in her Constitution of 1776, relinquished her claims in the Colonies of Maryland, Pennsylvania and North and South Carolina, stating, however, that:

> "The territories, contained within the charters, erecting the colonies of Maryland, Pennsylvania, North and South Carolina, are hereby ceded, released, and forever confirmed to the people of those colonies respectively, with all the rights of property, jurisdiction and

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[1] The history of the boundary disputes is found in *Wharton v. Wise*, 153 U.S. 155, 38 L. Ed. 669; *Barnes v. State*, 186 Md. 287 47 A. 2d 50; Sharf's *History of Maryland* (1789), Vol. 2; The Compact of 1785, Research Report No. 26 of the Legislative Council of Maryland, Carl N. Everstine (1946).

> government, and all other rights whatsoever, which might, at any time heretofore, have been claimed by Virginia, *except the free navigation and use of the rivers Patomaque and Pokomoke,* * * *." (Emphasis supplied.)

In addition to the unsettled boundary dispute, there was certain friction between Maryland and Virginia arising out of the use of the Potomac River and the Chesapeake Bay. The chief problem which concerned the State of Maryland was the practice of the Commonwealth of Virginia to levy tolls on vessels proceeding up the Chesapeake Bay through the Virginia Capes. Virginia desired to open the Potomac River for western exploration and settlement. In 1777, Virginia extended an invitation to Maryland to appoint commissioners to discuss the use of the Bay, the Potomac and the Pocomoke Rivers.[2] Maryland accepted the invitation and appointed Daniel of St. Thomas Jenifer, Thomas Stone and Samuel Chase as Commissioners. Their instructions, given by the General Assembly of Maryland, were to require Virginia to cease its practice of levying tolls on vessels proceeding up the Chesapeake Bay from the Virginia Capes.[3]

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[2] The invitation to Maryland stated the desire of the conference "to adjust and confirm the rights of each to the use and navigation and jurisdiction over the Bay of the Chesapeake, and the Rivers Potomac and Pocomoke. * * *".

[3] "1. You are to insist that the Commonwealth of Virginia shall expressly relinquish every claim of right to impose tolls on any vessel whatever sailing through the Capes of Chesapeake Bay to the State of Maryland or returning from this State through the said Capes outward bound; this you are to insist on as a condition *sine qua non;* and if not acquiesced in by the commissioners of the Commonwealth of Virginia you are to break up the conference and not enter into a discussion of any of the matters hereinafter mentioned.

"* * *

"3. You are to endeavor to obtain that the *use* and the navigation of the river Potomac, or Pocomoke, shall be free to the subjects of both states * * *."

For some unexplained reason, the Conference of 1777 failed. Thereafter, in 1784 another conference was arranged, and in March of 1785, at the invitation of George Washington, a new conference was held at Mount Vernon and the result was the adoption of the Compact of 1785. The Compact drafted at Mount Vernon was submitted to the respective legislatures and approved (Chapter 1, Laws of Maryland of 1785; Chapter 17, Virginia Acts of 1785). The Maryland Act specifically provided as follows:

> "II. BE IT ENACTED, by the General Assembly of Maryland, That the said compact is hereby approved, confirmed and ratified, and that as soon as the said compact shall be approved, confirmed and ratified, by the general assembly of the commonwealth of Virginia, thereupon, and immediately thereafter, every article, clause, matter and thing, in the same compact contained, shall be obligatory on this state and the citizens thereof, and shall be for ever faithfully and inviolably observed and kept by this government, and all its citizens, according to the true intent and meaning of the said compact; and the faith and honour of this state is hereby solemnly pledged and engaged to the general assembly of the commonwealth of Virginia, and the government and citizens thereof, that this law shall never be repealed or altered by the legislature of this government, without the consent of the government of Virginia."

The labors of the conferees of the 1785 conference were largely superseded by the Constitution of the United States, which was ratified and went into effect in 1789. To the Federal Government was surrendered the right to regulate commerce, collect tolls and to generally regulate maritime activities. The only sections retaining practical vitality were Sections 7 and 8, which insofar as is pertinent, read as follows:

> "7. The citizens of each state respectively shall have full property in the shores of Patowmack river adjoin-

ing their lands, with all emoluments and advantages thereto belonging, and the privilege of making and carrying out wharfs and other improvements, so as not to obstruct or injure the navigation of the river, but the right of fishing in the river shall be common to, and equally enjoyed by, the citizens of both states; * * *."

"8. All laws and regulations which may be necessary for the preservation of fish, * * * in the river Patowmack, * * * shall be made with the mutual consent and approbation of both states."

Throughout the ensuing years, the General Assembly of Maryland and the General Assembly of Virginia enacted concurrent legislation for the purpose of regulating the fisheries of the Potomac and Pocomoke Rivers.[4]

In 1874, both states agreed to the appointment of arbitrators to ascertain and fix the boundary between them. (See Chapter 247 of the Acts of Maryland of 1874). The arbitrators established the low water mark on the south shore of the Potomac River as the boundary between the two states. The legislation appointing the arbiters clearly reaffirmed the Compact of 1785.[5]

The award ascertaining the boundary, popularly known as the "Black-Jenkins Award", also ratified and confirmed the Compact of 1785.[6] This boundary award was approved

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[4] See the Compact of 1785, Research Report of No. 26, Maryland Legislative Council, Carl N. Everstine; and Opinion of I. Nevett Steele to Governor Lloyd of Maryland in December, 1885, and referred to in *Barnes v. State, supra*, note 1.

[5] "* * * Neither of the States, nor the citizens thereof, shall by the decision of said arbitrators be deprived of any of the rights and privileges enumerated and set forth in the Compact between them entered into in the year 1785, but that the same shall remain to and be enjoyed by the said States and the citizens thereof forever."

[6] "* * * Nothing in this act shall be construed in any way to impair, alter or abridge any rights which either state or the citizens

by Congress pursuant to Article I, Section 10, of the Constitution of the United States. (*Statutes at Large*, 1878-79, Chapter 179, page 43.)

In 1894, the Supreme Court of the United States, in *Wharton v. Wise*, 153 U.S. 155, 38 L. Ed. 669, was called upon to determine whether the Compact of 1785 continued in force after the adoption of the Constitution, except insofar as inconsistent with its provisions. Wharton was indicted by Virginia for oystering on the Virginia side of Pocomoke Sound. He was represented by Attorney General John P. Poe, who based his case upon the contention that the Compact of 1785 was still subsisting and binding. Mr. Justice Field, speaking for the Supreme Court, stated as follows:

> "As justly observed, there could not be a more solemn and conclusive recognition and assertion — so far as the two states were concerned — of the continued existence and obligatory force of the compact that is contained in this language of both in appointing the arbitrators and designating the conditions upon which their award should be accepted. The states of Maryland and Virginia not only consented to the appointment of the arbitrators upon the conditions mentioned, but their award was approved by both states and by an act of Congress. * * *."

Through the years, disagreements arose between the states as to the appropriate measures to conserve the fisheries resources of the lower Potomac River. In 1931, the two states, recognizing the depletion of the oyster beds of the Potomac River, enacted legislation which prohibited dreding by the citizens of both states. During the follow-

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thereof, may be entitled to, either by, through, under or against the Compact entered into between the States of Maryland and Virginia on the twenty-eighth day of March, seventeen hundred and eighty-five, * * *"

ing years, Virginians desired to continue their dredging operations and subsequently passed legislation authorizing dredging, to which legislation Maryland has never consented. During the period of World War II and the post-war era, the price of oysters rose sharply, and Virginians were willing to risk arrest in order to reap the golden harvest. (See "*The Compacts and The River*" by William J. McWilliams, Daily Record, June 19, 1959.)

In 1945, the General Assembly of Maryland, by joint resolution, directed that a commission be appointed to restudy the Compact and consider the establishment of an inter-state agency or authority to make and enforce regulations applicable to the fisheries of the tidewater portion of the Potomac River and of the tidewaters of the Chesapeake Bay. (See Resolution No. 17, Laws of 1945, page 1962.) As a result of the Commission's study, the General Assembly of Maryland, by Chapter 484 of the Laws of 1949, passed legislation creating a Maryland-Virginia Chesapeake-Potomac Authority by adding fifteen new articles to the Compact of 1785. The said law determined that the most efficient manner of regulating the fishery resources of the Potomac River would be through a bi-state agency. Unfortunately, at that time the Virginia Legislature refused to concur and in 1952, by Chapter 52 of the Acts of Virginia, Virginia enacted a comprehensive law providing for joint control of the Potomac River by a bi-state agency. This counter-offer by Virginia was never acquiesced in by Maryland. As a result of the inability of the two states to mutually resolve their dispute, illegal dredging by the Virginians continued in spite of a determined effort of enforcement by the Tidewater Fisheries Commission of Maryland. This matter reached a climax in 1957 when the General Assembly of Maryland, by Chapter 766 of the Acts of 1957, unilaterally abrogated the

Compact of 1785. The temper of the General Assembly of Maryland can be measured by the preamble clauses of Chapter 766.[7]

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[7] Whereas, the State of Maryland is the undisputed owner of the entire bed of the Potomac River to the low water mark on the Virginia shore, and

"Whereas, in the year 1785, the General Assembly of Maryland, by Chapter 1 of the Session Laws of that year, confirmed a compact entered into between the states of Maryland and Virginia in the year 1785, and thereafter known as the Compact of 1785, and

"Whereas, at the time of the promulgation of this Compact there were two main elements of consideration leading to the agreement between the State of Maryland and the State of Virginia; Virginia, on her part, would relinquish any right to charge tolls for vessels going to and from Maryland and passing through the Virginia Capes; Maryland, on her part, granted unto the citizens of Virginia certain rights of fishing and navigation in the waters of the Chesapeake Bay and in the Potomac and Pocomoke Rivers, and

"Whereas, by the subsequent adoption and ratification of the Constitution of the United States, important parts of the Compact of 1785 were immediately superseded and were made obsolete, since those articles of the Compact having to do with maritime matters and with interstate trade concerned areas of jurisdiction which were given to the Federal Government and henceforth were beyond the powers of the individual states, and

"Whereas, for over one hundred years the State of Virginia has recognized that these parts of the Compact have been superseded by the United States Constitution and as far back as 1849 the State of Virginia by the adoption of a Code, has only incorporated Articles 7, 8, 10 and 11 of the Compact and has regarded all other Articles as obsolete and of no further force and effect, and

"Whereas the State of Maryland has recognized the valuable natural resources lying in the Potomac River, and has sought to effectuate a uniform system of preservation and conservation of these natural resources to the mutual benefit of the citizens of both Maryland and Virginia, and

"Whereas, the citizens and law enforcement personnel of the State of Virginia have callously and intentionally disregarded, disobeyed and interfered with the enforcement of laws regulating the acquisition, preservation and conservation of natural resources in the Potomac River, and

"Whereas, the State of Maryland has requested the State of Virginia to cooperate in the preservation and conservation of these natural resources of the Potomac River which the State of Virginia

Simultaneously with the passage of Chapter 766 of the Laws of Maryland of 1957, the General Assembly enacted Chapter 770, which granted to the citizens of the State of Maryland the citizens of the State of Virginia permission to take fish, oysters and crabs from the Potomac River after complying with the Laws of the State of Maryland.[8]

The Commonwealth of Virginia, on September 13, 1957, filed a bill of complaint in the Supreme Court of the

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has effectively refused to do, all of which is to the mutual detriment of the citizens of both states, and

"Whereas, the State of Virginia has clearly demonstrated its unwillingness and open refusal to cooperate in the enforcement of existing laws and to adopt new laws for the effective enforcement of the preservation and conservation of these valuable natural resources, and

"Whereas, the State of Virginia has clearly demonstrated its intention to disregard and flout the rights of the State of Maryland as owner of the bed of the Potomac River and to interfere with the lawful rights of the State of Maryland and its citizens, and

"Whereas, the State of Maryland has ably, without incident, regulated the various rivers and waters binding on sister states, including the State of Virginia, lying outside the jurisdiction of the Compact of 1785, to the mutual and continued benefit of the citizens of Maryland and the citizens of adjoining states, and

"Whereas, the hostility shown by the officials and citizens of the State of Virginia to the law enforcement officers and citizens of the State of Maryland on the Potomac River, by reason of shootings and sabotage of vessels has created a situation which the State of Maryland can no longer tolerate, and

[8] It is clear that the General Assembly of Maryland did not desire to prohibit Virginians from enjoying the use of the Potomac River, for in the concluding paragraph of Chapter 770, Laws of 1957, it stated as follows:

"Sec. 2. And be it further enacted, That it is the legislative intent in the enactment of this law to vest in the State of Maryland all the licensing provisions concerning the taking of fish, oysters, crabs and clams from the Potomac River, to give the State of Maryland and its law enforcement officers complete control and jurisdiction over such fisheries in the Potomac River and (except as provided herein) to give to residents of the State of Virginia *an equal rights with citizens of Maryland in the use and enjoyment of such fisheries* to be exercised solely under the laws of the State of Maryland."

United States (No. 12, Original, Supreme Court of the United States, October Term, 1957) seeking to have the Compact of 1785 declared to be forever binding upon the State of Maryland and the Commonwealth of Virginia, and also seeking to have Chapters 766 and 770 of the Acts of 1957, *supra*, declared null and void. The Supreme Court accepted jurisdiction of the case and referred the matter to Mr. Justice Stanley Reed, retired, who was to act as Special Master (355 U.S. 946).

Mr. Justice Reed, after conferring with the Attorneys General of the respective states, passed an order staying the proceedings in order to give the two states an opportunity to attempt to adjust their differences. This stay order is now in effect.

The Governors of the respective states appointed commissioners for the purpose of resolving the differences existing between the two states. The Maryland commissioners, appointed by former Governor Theodore R. McKeldin, were: Carlyle Barton, Esq., Chairman, Judge Edward S. Delaplaine, Judge Stephen R. Collins, M. William Adelson, Esq. and William J. McWilliams, Esq. As a result of the deliberations of the Maryland Commission and their Virginia counterparts, the Potomac River Compact of 1958 was drafted and signed. Said Compact was submitted to the General Assembly of Maryland and ratified by the provisions of Chapter 269 of the Laws of 1959.[9] The said Compact has also been approved by the General Assembly of Virginia.

The provisions of Chapter 269, *supra*, were submitted to the voters at the General Election held on November 8, 1960, pursuant to the provisions of Article XVI of the

[9] For a complete analysis of the terms of the Compact, its advantages and disadvantages, see "*The Compacts and the River*" by William J. McWilliams, *supra*.

Constitution of Maryland after a petition by the requisite number of voters requesting a referendum on said law, had been submitted to the Secretary of State. It is the manner of the conduct of said election which has precipitated these proceedings.

ARGUMENT

I.

The Federal Question Sought To Be Reviewed Was Not Properly Raised and Preserved Below.

The Appellants did not raise in their complaint, brief or in oral argument in the Court of Appeals of Maryland the issues now sought to be raised by their Jurisdictional Statement. The opinion of the Court of Appeals of Maryland itself recognizes that the questions presented to this Court were not before the Court of Appeals of Maryland and were not considered by it (Jurisdictional Statement, Appendix A, pages 15, 16).

Based on the foregoing facts, it is beyond doubt that the questions sought to be reviewed are not now before this Court. The Maryland Court of Appeals, like most other appellate courts, has consistently and uniformly held that any contentions on behalf of an appellant not briefed in that Court may be deemed to be abandoned and need not be considered before it.[10]

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[10] *Vestry of Emanuel Church of Balto. v. Safe Dep. & Tr. Co.*, 169 Md. 28, 37, 179 A. 164; *Taxes v. Aerial Products, Inc.*, 210 Md. 627, 644, 124 A. 2d 805; *Schneider v. Davis*, 194 Md. 316, 71 A. 2d 32; *Holler v. Lowery*, 175 Md. 149, 200 A. 353; *Wolfe v. State, use of Brown*, 173 Md. 103, 194 A. 832; *State v. United Rcys. & Elec. Co.*, 162 Md. 404, 159 A. 916; *Globe Slicing Mach. Co. v. Murphy*, 161 Md. 667, 158 A. 26; *May Co. v. Drury*, 160 Md. 143, 153 A. 61. See also Md. Rules of Procedure, Rule 831, formerly 39 of the Rules and Regulations respecting Appeals of the Court of Appeals of Maryland; *Schroeffer v. A. S. Abell Co.*, 4th C.C.A. 138 F. 2d 111, cert. den. 321 U.S. 763, rehearing den. 322 U.S. 770; 2 Maryland Law Encyclopedia, Appeal and Error, §402, pp. 312-13.

It is clear beyond the slightest question that no Federal issue was raised in the Circuit Court of Baltimore City or the Court of Appeals of Maryland and, therefore, there is nothing for this Court to review. *Wilson v. Cook*, 327 U.S. 474.

The Appellants for the first time seek to claim a deprivation of voting rights, claiming that voting "in the dark" is as much a dilution of the right to vote as that which is caused by malapportionment. The complaint does not allege that the Appellants were directly or indirectly denied either the right to vote or that their vote was not fully counted on the issue involved. The Appellants are now claiming that because of the adverse decision on the vote at the General Election of November 8, 1960, the voters of certain counties were denied equal protection of the law. There is no case or authority cited for the fact that it is the Appellee's responsibility to instruct the Appellants or others on how they should cast their vote. It is most novel that the Appellants now claim that the State has withheld knowledge of the matter being voted upon and, therefore, denied them "full participation" in the aforementioned election. The opinion of the Court of Appeals of Maryland clearly finds that it is beyond reason that almost 450,000 individuals who voted on the issue, or any substantial portion of them, did not understand the issue on which they voted. The total vote cast on the compact was larger than that cast for and against all but two of the fifteen constitutional amendments voted on at the same time. In addition, in twenty-one of the twenty-three counties of Maryland and in Baltimore City, the vote on the compact issue was greater than the average vote on all the constitutional questions.

II.

This Case Is Not Within the Appeal Jurisdiction of This Court.

The Appellants neither in their pleadings nor in their briefs have contended that the provisions of the Maryland Constitution or of Article 33, Section 170, of the Annotated Code of Maryland (1957 Ed.) are void, but, to the contrary, the Appellants have relied upon the provisions thereof as the basis of their cause of action in this case. At no stage of the proceedings was a Federal claim made that the provisions were void under the Federal Constitution. Under these circumstances, it is clear that the constitutional provisions and statute relating to the referendum were not challenged. The provisions of Chapter 269, *supra*, were not challenged as being in violation of any Federal constitutional right, but were challenged as being in violation of certain provisions of the Maryland Constitution.

The Maryland Court of Appeals ruled that the State of Maryland had the power to make a compact with a sister state and that the use of a compact for the execution of governmental functions is not an abdication but an exercise of government.

It is therefore clear that no appeal will lie, since the validity of a statute was not ruled upon on Federal constitutional grounds. *Raley v. Ohio*, 360 U.S. 423, 43[illegible]. *Charleston Federal Savings and Loan Asso. v. Alderson*, 324 U.S. 182.

III.

This Appeal Does Not Present the Question Sought To Be Reviewed or any Substantial Federal Question, and It Is Manifest that the Questions on which the Decision of this Case Depend are so Unsubstantial As To Not Require Further Argument.

The two elements in the Appellants' claim of Federal rights are:

(a) That by the failure to adequately publish the text of the referred law, an entire election on the referred law is void since it precluded the Appellants from voting intelligently upon the matter; and

(b) That the compact between the State of Maryland and the Commonwealth of Virginia abdicates the sovereignty of the State of Maryland and therefore would violate Appellants' right of due process and equal protection.

The alleged failure to adequately publish the text of the referred law was a question of interpretation of a State statute and a State constitutional provision. The Maryland Court of Appeals found a difference between the effect to be given election laws *before* an election and the effect of the same provisions *after* an election. The Court concluded that if the election has been held, the failure of election officials to strictly follow the law will not vitiate the express will of the electorate unless the failure of the election officials has interfered with the full and fair expression of the public will. It is clear that this holding does not involve any Federal question.

As to the second element, the record clearly shows that the Appellants have been deprived of no Federally-protected right whatsoever and that the State of Maryland

has merely exercised its governmental function to enter into a compact with a sister state to regulate a mutual problem. It has been clearly recognized that interstate compacts are a proper and necessary method of dealing with problems which affect more than one state. See Frankfurter & Landis, *The Compact Clause of the Constitution; A Study in Interstate Adjustments*, 34 Yale Law Journal, 685; *Hinderlider v. LaPlata R. & Cherry Creek D. Co.*, 304 U.S. 92; *West Virginia v. Sims*, 341 U.S. 22; *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275; *New York v. O'Neill*, 359 U.S. 1.

The Appellants have stated no substantial Federal issue and, therefore, this Court should dismiss the appeal or affirm the decision.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this appeal be dismissed, or in the alternative that the decision of the Court of Appeals of Maryland be affirmed, the mandate to issue forthwith.

Respectfully submitted,

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For Appellee.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 533

JAMES W. DUTTON, ET AL.,
Appellants,

v.

J. MILLARD TAWES, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF MARYLAND,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

APPELLANTS' BRIEF OPPOSING APPELLEE'S MOTION TO DISMISS OR AFFIRM

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ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

APPELLANTS' BRIEF OPPOSING APPELLEE'S MOTION TO DISMISS OR AFFIRM

The appellees have moved to dismiss the appeal or affirm the judgment of the court below on the grounds (a) that the federal question was not properly raised and preserved below (b) that the case is not within the appeal jurisdiction of this Court and (c) that the appeal does not present any substantial federal questions.

The motion lacks merit. Constitutional questions were raised in the pleadings and in the arguments before the Circuit Court of Baltimore City and the Court of Appeals of Maryland. The ruling by the Court of Appeals that the

state statute in question is constitutional clearly brought the appeal within 28 U.S.C. Section 1257 (2). The federal questions involved are not only substantial, they are of great magnitude. They involve voters being deprived of equal protection of the laws, the transfer of powers from one state to another, the trial in one state of crimes allegedly committed in another state, etc.

I. The Federal Questions Were Properly Raised and Preserved Below.

The fact that the constitutional questions were properly raised and ruled upon below is shown on pages 15 and 16 of the Appellants' Jurisdictional Statement, Appendix A, wherein the opinion of the Court of Appeals of Maryland stated:

> "The bill also prayed declarations (1) that the text of Ch. 269 had not been published prior to the election as required by Sec. 5 of Art. XVI of the Maryland Constitution and Code (1957), Art. 33, Sec. 170, and therefore the vote on the proposed law was void, and (2) *that the Act is unconstitutional* because (a) it authorizes a joint commission of Marylanders and Virginians to regulate and police the conduct of Marylanders on the Maryland owned Potomac River; (b) it empowers Virginia courts to try Maryland citizens for the commission of crimes on the Potomac River; (c) it delegates to the Joint Commission the legislative power to reduce punishment for criminal offenses on the Potomac River; (d) it usurps the power of future legislatures by binding them to make annual appropriations of not less than $50,000 for the Joint Commission; (e) it abdicates the Legislature's power to pass laws relating to fish, crabs, oysters and clams in the Potomac River after December 1, 1958; and (f) the title is deficient.
>
> "Judge Sodaro held the Act to have been duly approved by the voters and to be *constitutional*." (Emphasis added.)

II. This Court Has Jurisdiction.

As shown above, the questions concerning the constitutionality of the state statute were raised below. The state court ruled in favor of its validity, as shown on page 30 of the Appellants' Jurisdictional Statement, Appendix A:

> "The decree appealed from, to the extent that it held that *Ch. 269 of the Acts of 1959 was*, on its face, *a constitutional enactment* which was validly approved and ratified by the voters on November 8, 1960, and its dismissal of the Bill is affirmed." (Emphasis added.)

This Court therefore has jurisdiction under 28 U.S.C. Section 1257 (2).

III. Federal Questions Are Substantial.

This case involves not one, but several substantial federal questions, as set forth on pages 8-14 of the Jurisdictional Statement.

Since the case is within the appellate jurisdiction of this Court and it presents substantial federal questions, **Appellee's motion should be denied.**

Respectfully submitted,

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